

The CURE

Contract User's Resource for Excellence

The "CURE" is a quarterly newsletter of the State Controller's Office

Volume 10, Issue 3

August 2004

News From The SCO A State Controller's Office Update

CCIT MEETING

DATE & LOCATION CHANGE

The August CCIT (Colorado Contract Improvement Team) meeting will be held on Wednesday, August 18th from 9:00 a.m. - 12:00 noon at the Denver National Guard Armory. The address is 5275 Franklin Street, Denver, (please see page 8 for directions). If you have questions about the meeting, please call Yvonne Anderson at (303) 866-2862.

"What's Inside" includes:

- ⇒ New Holdover Clause
- ⇒ What to do with a current contract when the company has merged with another company or no longer exists.
- ⇒ Upcoming Personal Services Training & Annual Report
- ⇒ Basic Ordering Agreements
- ⇒ Website addresses
- ⇒ CCIT Meeting Agenda

E-MAIL ADDRESS CHANGES

To make sure you do not miss an issue of the CURE or other important state contract information be sure that you keep your e-mail address current by sending changes to Kevin in the SCO CCU at:

kevin.cruise@state.co.us

Central Approvers Names and Numbers

Department of Personnel & Administration (DPA)

State Controller's Office (SCO)

Central Contract Unit:	Phone Number	Fax Number
Phil Holtmann	303-866-3809	303-866-4233
Yvonne Anderson	303-866-2862	303-866-4233

Routing, Distribution and E-mail Updates:

Kevin Cruise	303-866-2127	303-866-3569
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Statutory Violations:

Ron Keller	303-866-3539	303-866-3569
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Human Resource Services (DPA/HRS)

Personal Services Review Program:

Joi Simpson	303-866-5496	303-866-2458
Don Fowler	303-866-4250	303-866-2458

State Buildings and Real Estate Programs (REP)

Larry Friedberg	303-866-3079	
Dana Stansbury	303-866-6141	303-894-7478

Donna Barr (REP)	303-866-4564	303-866-2201
Clark Bolser (REP)	303-866-4759	303-866-2201

State Purchasing (SPO)

Monica Rahman	303-866-6155	303-894-7440
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Office of the Attorney General (AGO)

Meg Whitelaw	303-866-3376	303-866-4139
Heidi Dineen	303-866-5437	303-866-4139
Bea Pagette	303-866-5227	303-866-4139
Tracy Kinsella (CDOT Attorney)	303-866-5052	

HOLDOVER CLAUSE FOR SERVICE CONTRACTS

by Phil Holtmann, Central Contracts Manager
State Controller's Office

A REMINDER . . .

Please remember that this clause needs to be added to your current contracts when appropriate.

State agencies often enter into service contracts with vendors or providers for critical services that if stopped would cause a risk to the state or to the individuals that are receiving the services. Often, these types of contracts arrive too late at the State Controller's Office (SCO) to be signed before a previous contract term ends. The SCO has attempted to eliminate this problem by allowing agencies to use option letters to extend contracts for subsequent years, but even this process does not work when a new contract must be drafted.

In order to further alleviate the issue of late contracts and statutory violations the SCO is recommending that agencies incorporate the following holdover language into these service provider contracts:

In the event that the state agency desires to continue the services and a replacement contract has not been fully executed by the ending term date of this contract, this contract may be extended unilaterally by the state for a period of up to two months upon written notice to the contractor under the same terms and conditions of the original contract including, but not limited to prices, rates, and service delivery requirements. However, this extension terminates when the replacement contract becomes effective when signed by the State Controller or an authorized delegate.

Contract Assignments: What Should I Do?

**by Tracy L. Kinsella, Assistant Attorney General
Attorney General's Office**

Often, the question gets asked, what do I do when the company that my agency has contracted with no longer exists, or has merged with another company or has disappeared completely? Each scenario has different facts that may develop and leads to confusion regarding how to handle the existing contract.

The first rule is to deal with the situation immediately. The agreement that must be signed usually requires three signatures: (1) the agency, (2) the original contracting party, and (3) the new contracting party. Don't wait until the original contracting party has disappeared or no longer has any reason to cooperate. Further, remember that C.R.S. § 24-30-2021) requires a commitment voucher be in place prior to incurring any financial liability. No new party should be allowed to perform any work under a contract to which it is not a proper party.

The following are recommendations for how to address these situations:

A. Novation Agreements. This is the typical agreement that is recommended when the contractor either merges with another company or a parent company is selling off a subsidiary. The standard form Novation Agreement is a three party agreement between the agency, the original contracting party and the new contracting party. It is recommended that the standard form Novation Agreement be used as soon as the change in the contractor's name is known.

B. Assignment Agreements. Occasionally the attorney general's office is contacted and told that the original contracting party cannot (or will not) sign a Novation Agreement for various reasons. This usually involves a situation whereby the company has dissolved and a new company has been created. In the dissolution, the company failed to identify anyone as retaining signature authority. Therefore, there is only one party left. This type of an agreement may also be used in a merger or buyout situation if the original contracting party also failed to retain anyone with signature authority.

To address this situation, an Assignment Agreement between the agency and the new company may be entered into. There is no standard Assignment Agreement. Such an agreement must include a recitation of the facts, an assignment of the original contract, a new notice provision and the standard language found in the standard Contract Amendment form. In addition, an additional clause regarding indemnification must be inserted. The clause is as follows:

Transferee agrees to indemnify, save and hold harmless the State, its employees and agents, against any loss, cost and damages, including reasonable legal fees, for which the State, its employees and agents are found to be legally responsible by a court or other tribunal with jurisdiction or are included in a settlement agreed to by Transferee, resulting from any and all claims or other actions that may be brought by {insert name of original contracting party} with respect to the Contract.

A word of caution here though. Again, it must be stressed that some of the situations arising here might be avoided with appropriate contract management. For instance, if the agency is requested to make payment to a different party that should signal that the contracting party is changing. If an agency's failure to identify changes of ownership results in the inability to enter into a Novation Agreement, such failure to appropriately manage the contract may result in the denial of the Assignment Agreement by either the Attorney General's office or the State Controller's office.

C. Contract Termination. Some situations cannot and should not be handled by a Novation or Assignment Agreement. For instance, if the contracting party disappears and cannot be found an agency cannot merely substitute any other party. Colorado has specific laws that require open competitive bidding. If the new party has no legal relationship with the contracting party State laws generally prohibit the substitution of another party.

The agency is not stuck with a worthless contract in this situation. The contract should include a termination for default/cause clause. If the suggested state wording is utilized, the contract may be terminated in accordance termination provision upon written notice to the address provided for in the notice section. At the end of the time period specified in the notice, the agency is free to contract with another party. In some situations, this may require the agency to bid out the work again. However, if the circumstances indicate an emergency the agency approved procedures for obtaining commitment vouchers for emergency situations may be followed.

D. Leases. Real estate contracts are handled differently than regular state contracts in an assignment situation. The Real Estate Programs office has developed an Assignment and Assumption Agreement, which should be used when leased property is sold to a new owner. Also, the Lease has been reworked to include an attornment and non-disturbance clause which specifically covers a lease assignment or property sale situation. The clause is as follows:

CONVEYANCE OF THE PREMISES, ATTORNMENT AND NON-DISTURBANCE. If the Premises are sold, transferred or conveyed, or if Lessor assigns this Lease, Lessor shall provide notice pursuant to section 18 of this Lease within ten (10) days of such conveyance or assignment. Said notice shall include the name and address of New Lessor, Social Security or Federal Employer's Identification Number of New Lessor and a copy of the deed, assignment agreement, or other evidence of the conveyance or assignment.

Lessee agrees to attorn to any assignee of this Lease, or to any purchaser of the Premises, or any other successor owner or assignee of Lessor through foreclosure or deed in lieu of foreclosure (the "New Lessor"), provided the New Lessor grants to Lessee a non-disturbance agreement which provides that Lessee, notwithstanding any default of Lessor hereunder, shall have the right to remain in possession of the Premises in accordance with the terms and provisions of the Lease for so long as Lessee shall not be in default under the Lease. The non-disturbance agreement shall be executed by the New Lessor and shall indicate that: (1) nothing in the non-disturbance agreement shall be construed as a waiver of any rights of the Lessee against the Lessor, and (2) all payment previously made by the Lessee to the Lessor and all other previous actions taken by the Lessee under the Lease, shall be considered to have been discharged those obligations of Lessee under the Lease.

If the lease at issue does not involve the above clause, the agency should contact the Real Estate Programs office for guidance on the proper document, likely an Assignment and Assumption Agreement, and language to be used.



PERSONAL SERVICES UPDATE

UPCOMING TRAINING SCHEDULE

Level I - The Basics: 8:30 am - 4:30 pm

Locations: Denver - Thursday, August 26 - 1313 Sherman Street, Room 220
Ft. Morgan - Thursday, September 30 - Morgan Community College, Founders Rm.

Level II - Advanced: 8:30 am - 2:30 pm

Location: Pueblo - Thursday, September 9 - Colorado State University @ Pueblo,
Blue Spruce Room #204 in the Occhiator University Center

For a complete description on training courses please visit our website at <http://www.colorado.gov/dpa/dhr/oversight/documents/contractpcp.pdf>

ANNUAL REPORT

The Personal Services Annual Report due date is fast approaching. Departments should be reviewing and verifying summary totals for each contract category in the State's Financial Data Warehouse. Changes to these summary totals, if any, should be submitted to Joi Simpson at joi.simpson@state.co.us by **September 30, 2004**. For questions please contact Joi Simpson at 303.866.5496.



Statewide Contracts
Training—details will be
available soon. . .

A Note from State Purchasing...

by Kay Kishline
State Procurement Director

BASIC ORDERING AGREEMENTS—WHEN & HOW THEY WORK

The State Purchasing Office (SPO), on behalf of the Statewide Travel Management Program, establishes and administers multiple automobile rental agreements for use by state travelers on official state business. In the past, price agreements were established through a competitive IFB or RFP process. However, the SPO felt that the state would be better served by entering into Basic Ordering Agreements (BOA's) with these vendors. The travel industry is a dynamic market in respect to the services provided and the rates extended to travelers. As such, flexibility is required to assure that the needs of state travelers are served in the most effective manner possible. In several ways, BOA's offer the extra flexibility needed in this market, as compared to the traditional competitive solicitation and price agreement.

The traditional solicitation method "locks in" prices, terms, and conditions for at least one year, usually longer. Vendors are not allowed to change their pricing during the term of their award to accommodate changes in market conditions without express permission. As a result vendors may not be able to commit to the lowest possible prices.

The BOA, however, provides the flexibility needed for this market. A BOA is awarded to any vendor who meets the State's minimum service requirements, terms, and conditions and who provides fair and reasonable prices. BOA's are "open ended" in that the State can terminate a vendor at any time for poor performance and/or failure to maintain competitive rates. The likely result is that state travelers will enjoy better service and lower rates. Vendors who do not have a BOA with the State may make an offer at any time, and if they agree to the terms and conditions and are offering competitive pricing, they may be awarded a BOA. Vendors with a BOA may request rate increases on a quarterly basis. However, the State will accept a rate reduction at any time. In addition, vendors may request that certain cities be deleted or added to their BOA on a quarterly basis, and promotional rates and additional services may be offered at any time. The process is flexible and is designed to give the state the advantage of a very competitive marketplace plus the protection of an agreement as to terms and conditions, particularly with regard to insurance. Further, rental car rates and services vary significantly from city to city. Thus, having BOA's with the maximum number of vendors increases the agencies' and travelers' ability to pick the best deal in a particular city, and it increases the likelihood that a traveler will still be able to find a contract vendor if plans change unexpectedly.

DOES THIS PROCESS MEET PROCUREMENT CODE REQUIREMENTS?

The key to the use of the BOA is that no single purchase will exceed the discretionary purchasing threshold (now \$5,000). Therefore, no specific type of competition is required. Obviously, the state's aggregate spend under a BOA will exceed \$5,000 in a year. However, the test is whether each single purchase can reasonably be viewed as a separate purchase – rather than an illegally "split" purchase. The following factors are the basis for making this determination:

- Can the state or agency specifically define its need for the entire fiscal year (i.e. could it all be adequately specified and put into a single solicitation and order?);
- Does the state/agency know when and where it will need the vendor's products/services;

Article Continuation from page 6

- Does the state have an on-going defined need for the product/service, even though the contract or agreement can be terminated at will (e.g. a contract for janitorial service or a lease of office equipment);
- Does the purchase drive a requirement for a second purchase or can it reasonably stand alone;
- Will the purchase result in a requirements contract (i.e. will the state/agency commit to exclusive use of this agreement to fill all of its needs)?

In the case of rental cars, no single purchase will approach the \$5,000 threshold. The state can estimate its total volume for the year and its volume for certain major cities. However, neither the state nor an individual agency can identify, even one year in advance, exactly where and when each trip will be made or how many days a rental car will be needed. Further each rental is truly a separate transaction. Renting a car in Des Moines is not the same as renting one in New York City; renting one in Miami in February is different than renting one in Miami in August.

Our conclusion, after looking at these factors, was that car rentals are small purchases. The state can recognize significant value by negotiating favorable terms, conditions, and ceiling prices, but treating the annual estimated rental car volume as a single purchase is both unnecessary and disadvantageous. Therefore, we felt that dynamic, market driven BOA's were a much more competitive approach than lumping the entire state demand into a single procurement every five years.

WHAT IS THE DIFFERENCE BETWEEN PRICE AGREEMENTS AND BOA'S?

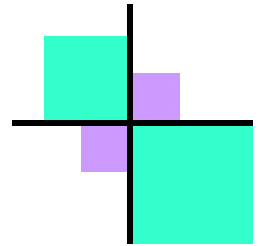
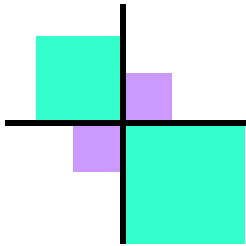
Price agreements are awarded on the basis of a competitive solicitation. Therefore, purchases can be made under the terms of the agreement for any dollar amount (or up to the ceiling named in the agreement and solicitation). BOA's do not require a competitive solicitation as an initial selection mechanism because they encompass only low dollar purchases. Further, since BOA's are normally awarded to two or more competing vendors, the state benefits from on-going competition rather than just a single competition before the award.

Also, price agreements are for a limited term, usually five years, while BOA's can be extended or terminated based on the competitiveness of pricing and service.

WHEN IS A BOA APPROPRIATE?

A BOA is a valuable tool when individual purchases will always be under the small purchase threshold (now \$5,000). It enables the state to get the advantages of volume purchasing discounts and added services (e.g. delivery) plus the protection of the state's terms and conditions, but does not require the initial cost of a lengthy competitive process. Ideally, BOA's should be entered into with two or more competing vendors. This gives the state the advantage of on-going competition, and it motivates vendors to offer us special discounts and promotional opportunities.

Further, BOA's function best when there are a limited number of available vendors that can meet the state's requirements. Too many available vendors make it difficult to justify how vendors were selected; conversely, if a great many competing BOA's are awarded, it becomes difficult or impossible to manage the agreements to ensure that end users get the proper pricing and support services. For more information on BOA's contact the State Purchasing Office.



DIRECTIONS TO THE DENVER NATIONAL GUARD ARMORY

From I-70—

Street Exit to 54th (Corvette Connection on right) to the end of the street and turn right to Franklin then right again a couple of blocks to the Armory (you can't miss the tank on the lawn). Go right to the end of the street to the parking lot and navigate the barriers (they're security devices). Park anywhere in the lot and come into the auditorium at the front of the building.

From Downtown —Broadway/Brighton Blvd to 38th (Pepsi Plant) turn left at 38th and follow around to Washington, under I-70 and then to 54th (Corvette Connection on right), turn right and go to the end of the street to Franklin, right again a couple of blocks to the Armory. Go right to the end of the street to the parking lot and navigate the barriers (they're security devices). Park anywhere in the lot and come into the auditorium at the front of the building.

From North I-25 —Exit at 58th and go to Franklin, right on Franklin to the Armory just beyond 54th, go to the end of the street to the parking lot and navigate the barriers. Go right to the end of the street to the parking lot and navigate the barriers (they're security devices). Park anywhere in the lot and come into the auditorium at the front of the building.



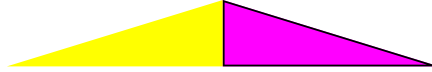
**On the World Wide Web at :
www.sco.state.co.us/**

CONTRACT PROCEDURES AND MANAGEMENT
MANUAL
contract/contractprocedures.htm

CURE
cure/cure.htm

PERSONAL SERVICES REVIEW PROGRAM
AND RELATED FORMS

www.state.co.us/hrs/contracts/index.htm



CCIT (Colorado Contract Improvement Team) Meeting

Wednesday, August 18, 2004

Denver National Guard Armory

Agenda

9:00—9:10 am.....Welcome.....Phil Holtmann, SCO
Central Contracts Manager
9:10—9:20 am.....Real Estate Programs Update.....Donna Barr
Real Estate Programs Manager
9:20—9:30 am... ..Contracts Training Update.....Richard Pennington
Division Director, DFP

Summary

This two-hour presentation will instruct legal practitioners and experienced contracting administrators in the essential concepts of intellectual property law, state contracting issues commonly encountered involving intellectual property, and practical tips for resolving intellectual property issues during contract formation. In addition, this training will include 2 CLE credits.

9:30 - 9:50 Intellectual Property Overview

9:50 - 10:05 Types of Software Agreements

10:05 - 10:20 "Red Flag" Issues in Contracting: Licensing Issues and Warranties

10:20 - 10:30 BREAK

10:30 - 11:10 "Red Flag" Issues (Cont'd): Risk Allocation and Confidentiality

11:10 - 11:30 Handling Vendor Agreements

